APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-3083 and 81-3084

In the Matter of: MARIN MOTOR OIL, INC.,
Debtor

(Bankruptcy No. 81-02263)

OFFICIAL UNSECURED CREDITORS' COMMITTEE

v.

DAVID P. MICHAELS, TRUSTEE of Marin Motor Oil, Inc. and HONORABLE HUGH LEONARD, U.S. TRUSTEE

Nicholas Marin, Nick-O-Mar Realty Corp., Petrobras Company, Inc., Marin Retail Gasoline Sales Company, Marin Oil Co., Inc., Fra Mar, Inc., Marin Mercantile Oil Exchange, Marin Drilling Corp., Marin Holding Company,
Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

C.A. No. 81-03273
(Adversary Nos. 81-616 & 81-639)

Argued July 20, 1982

Before: ADAMS and HIGGINBOTHAM, *Circuit Judges*, and TEITELBAUM, *District Judge**

(Filed September 29, 1982)

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*Honorable Hubert I. Teitelbaum, United States District Court for the Western District of Pennsylvania, sitting by designation.

Appendix A

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OPINION OF THE COURT

ADAMS, *Circuit Judge.*

We are called upon in this appeal to determine whether a creditors' committee in a bankruptcy reorganization has the right to intervene in adversary proceedings instituted by a trustee. We first decide that we have jurisdiction under 28 U.S.C. §1293(b) to address this issue at this stage of the litigation, and then proceed to ascertain that under the applicable section of the Bankruptcy Code, 11 U.S.C. §1109(b), a creditors' committee has a right to intervene, a right that is not satisfied by participation as a mere *amicus curiae*. Accordingly we affirm the order of the district court granting intervention.

Appendix A

I.

On April 21, 1981, Marin Motor Oil, Inc. filed a voluntary petition in the United States Bankruptcy Court for the District of New Jersey for reorganization under Chapter 11 of the Bankruptcy Code. All outstanding shares of Marin were owned by Nicholas Marin. Marin and his wife, Ilse Marin, also owned and controlled several related companies.

Two weeks after the petition was filed, the United States Trustee[1] appointed the Official Unsecured Creditors' Committee ("Committee") pursuant to 11 U.S.C. §151102, and on May 11 the Committee moved for the appointment of a trustee of the estate. Before a trustee was appointed, the Committee filed a complaint seeking to have the various related companies included in the proceedings. Several days later, on May 19, the United States Trustee appointed a trustee of the estate (hereinafter referred to as "Trustee"). *See* 11 U.S.C. §151104. Appointment of a trustee is the exception and not the rule in a Chapter 11 case, Weintraub & Resnick, Bankruptcy Law Manual ¶8.13[1] (1980), but appointment of a trustee was requested by the United States Trustee because the facts of this case indicated a need for a disinterested third party to investigate the situation, to take appropriate action, and to oversee and manage the business.

The Trustee entered into a stipulation on June 16 with the Marins and the various Marin companies, freezing their assets; the stipulation was to terminate in 45 days. On July 2, the Committee voluntarily withdrew its complaint with the understanding that an order

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1. The United States Trustee pilot program is currently in effect in the District of New Jersey and several other districts (11 U.S.C. §1501). Under this program, the United States Trustee, who is appointed by the Attorney General (28 U.S.C. §581), performs certain administrative tasks, including some that are otherwise reserved for the bankruptcy judge.

freezing the assets of the Marins and the Marin companies would be sought and that the Trustee would vigorously pursue his own complaint.

The Trustee then instituted the two adversary proceedings in which the Committee ultimately sought to intervene, and which gave rise to this appeal. The first adversary proceeding, instituted July 14, 1981, sought to recover for the estate a home and furnishings in Tenafly, New Jersey. The home was purchased with money that Nicholas Marin had borrowed from Marin Motor Oil. Nominal title to the home was held by the Marin Holding Company, a company under the complete control of Nicholas Marin. The Trustee asked for the imposition of a constructive trust on the home and furnishings, and for a declaration that Marin Motor Oil was the beneficial owner. The second adversary proceeding, instituted July 17, 1981, sought to extend the pending Chapter 11 proceedings to include the Marins individually and the various Marin companies besides Marin Motor Oil. The Trustee's complaint alleged that the various companies had been operated as a single economic unit, without observance of the requisite formalities; that the Marins had "complete control" over the various companies; that the Marins' personal assets were inextricably intertwined with those of the companies; that Marin Motor Oil financed the other companies; and that the purpose and effect of forming the other companies was to delay and defraud creditors.

During the following months, the Committee became increasingly dissatisfied with the Trustee's performance. It was especially disturbed that the Trustee had allowed the stipulation freezing the assets to lapse, although another stipulation was eventually extended to September 14. In early October, the Committee sought, under 11 U.S.C. §1109(b), to intervene in the two adversary proceedings brought by the Trustee. Although the Committee's supporting affidavit contained serious complaints about the Trustee's handling of the proceedings,

the Committee based its motion almost entirely on the claim that section 1109(b) accorded it an absolute right to intervene regardless of the Trustee's performance.

Reading section 1109(b) as permissive rather than mandatory, the bankruptcy court refused to grant intervention. It did, however, afford the Committee *amicus curiae* status "limited to the submission of briefs on all factual and legal issues raised and considered." Appendix at 5. The Committee then filed a Notice of Appeal to the United States District Court for the District of New Jersey. The district judge reversed, holding that section 1109(b) was mandatory, and could not be satisfied by allowing the Committee to participate as an *amicus curiae*. The district court's order was appealed to this Court by the Trustee and by the Marins and the Marin companies.

II.

Before we can reach the merits of this dispute, it is necessary for us to determine that we have appellate jurisdiction at this juncture of the proceedings. Although the question is not free from doubt, we conclude that there is jurisdiction.

The usual rule in this Circuit is that "[w]hen an absolute right to intervene in a lawsuit is claimed, and the claim is rejected, the order denying intervention is considered final and appealable." *Commonwealth of Pennsylvania v. Rizzo*, 530 F.2d 501, 504 (3d Cir.), *cert. denied*, 426 U.S. 921 (1976) (quoting *Philadelphia Electric Co. v. Westinghouse Electric Corp.*, 308 F.2d 856, 859 (3d Cir. 1962), *cert. denied*, 372 U.S. 936 (1963)). On the other hand, an order granting intervention is ordinarily not considered appealable. *EEOC v. American Telephone & Telegraph Co.*, 506 F.2d 735, 742 (3d Cir. 1974). *See also* C. Wright and A. Miller, 7A Federal Practice and Procedure §1923 (1972 & Supp. 1982): "An order granting leave to intervene is not final and is not appealable as of right" (footnote, citing cases, omitted).

These rules, however, were developed in appeals under 28 U.S.C. §1291, not in the special context of appeals under 28 U.S.C. §1293(b), "a comprehensive and exclusive schema for jurisdiction of bankruptcy appeals," *Universal Minerals, Inc. v. C. A. Hughes & Co.*, 669 F.2d 98, 101 n.3 (3d Cir. 1981). 28 U.S.C. §1293(b) reads:

> Notwithstanding section 1482 of this title, a court of appeals shall have jurisdiction of an appeal from a final judgment, order, or decree of an appellate panel created under section 160 or a District court of the United States or from a final judgment, order, or decree of a bankruptcy court of the United States if the parties to such appeal agree to a direct appeal to the court of appeals.

Section 1293(b) is, technically, not effective until April 1, 1984; but *Universal Minerals, supra*, 669 F.2d at 100 n.2, points out that by virtue of a "transition provision" we are currently vested with the same appellate authority that we would have under section 1293(b). Although section 1293(b), like section 1291, incorporates a "finality" requirement, it is not clear that this requirement must in all circumstances be given the same construction that it would have under section 1291. *See Universal Minerals*, 669 F.2d at 101 n.3.

There is no reason to doubt that the order of the bankruptcy court, denying a claimed absolute right of intervention, was final. Had the parties agreed to a direct appeal to this Court of that order, we would have had appellate jurisdiction under section 1293(b). The difficult question is whether we should apply the usual rule and hold that the district court's order granting intervention was interlocutory; or whether we should conclude that the district court, which was in essence an appellate tribunal reviewing a final judgment of a trial court, and whose order completely disposed of the appeal from the final judgment of the bankruptcy court, entered an appealable order.

As reluctant as we are to adopt an expansive interpretation of finality, *see Bachowski v. Usery*, 545 F.2d 363, 373-74 (3d Cir. 1976), we are persuaded both by the language of previous decisons of this Court and by a consideration of the policies underlying the general rule against interlocutory appeals that the district court's order should be considered final under section 1293(b).

In *Universal Minerals, supra*, 669 F.2d at 101, this Court observed that "[o]nce the district court's jurisdiction under §1334(a) [governing appeals to district courts of final orders of bankruptcy courts] is established, our jurisdiction under §1293(b) would seem to follow." If this statement is controlling, then clearly we have jurisdiction of the present appeal. It is true that *Universal Minerals* is distinguishable on its facts. In that case, the district court simply remanded to the bankruptcy court for an accounting. In this case, the bankruptcy court on remand from the district court must conduct, or continue to conduct, two full adversary proceedings. On the other hand, *Universal Minerals* apparently considered it significant that reversal of the district court's judgment in that case "would be preclusive of any further litigation on the relevant cause of action," *id.* at 101, quoting *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 482-83 (1975). A reversal of the district court's order in this case would preclude any further litigation on the part of the Committee in the bankruptcy court adversary proceedings (although the Committee could still participate as an *amicus*) and so could be considered final as to the Committee. Moreover, in the present case, as in *Universal Minerals*, "[t]he judgment of the district court certainly was final in the sense that nothing remained for the district court to do." *Id.* at 101.

In re Bildisco, 682 F.2d 72 (3d Cir. 1982), is also pertinent here. In *Bildisco*, this Court specifically declined to discuss the rationale employed by the district court in affirming a bankruptcy court ruling. Citing *Universal Minerals, supra*, 669 F.2d at 101-02, we wrote

that "[t]he district court's analysis need not detain us . . . because our role as a court of review is identical to that of the district court." *Id.* at 81 n.14. The passage from *Universal Minerals* which *Bildisco* cites notes that this Court is in as good a position to review the bankruptcy court's findings as is the district court. Where, as in the present case, an appeal is taken from a district court order *reversing* the bankruptcy court, it may be necessary to examine the district court's analysis as well as that of the bankruptcy court. Even if this is so, *Bildisco's* point that there is an identity of roles between the court of appeals and the district court in bankruptcy appeals strongly suggests that when the district court reviews a final order of the bankruptcy court, and we then review the district court's determination with respect to the bankruptcy court's order, we are in essence reviewing a final order of the bankruptcy court.

Policy considerations, as well as the language of *Bildisco* and *Universal Minerals*, also support a determination that the district court's order was appealable. Many of the principal rationales for narrowly construing finality are based on an understanding of the proper relation between a trial court and an appellate court, and have less applicability when one appellate court is asked to review what is in effect a lower appellate court. As one authority explains, "[t]he starting point of the final judgment rule, so obvious that it is ordinarily taken for granted, is found in the nature of the relationship between appellate and trial courts." This is because the trial court's "primary responsibilities for fact finding, standard application, and procedure mean that most rulings that precede factfinding do not lead to reversal, and that often a court of appeals can satisfactorily identify the controlling legal questions only after factfinding has been completed." C. Wright, A. Miller and E. Cooper, 15 Federal Practice and Procedure §3907 (1976). The commentators go on to note that "[m]any of the justifications for postponing review beyond the point at which the trial

court has finally decided a particular matter are cast in terms of saving time and avoiding unnecessary appeals." *Id.* at §3907. But when the trial court has already issued what is concededly a final judgment, and has not merely "finally decided a particular matter," then some of these justifications may have less force. For example, although two appeals may delay the trial more than one appeal would, and delay is a serious problem that the final judgment rule is designed to ameliorate, the damage if any to a speedy and coherent trial is occasioned for the most part by the initial appeal.[2]

Another consideration leading us to construe finality somewhat less narrowly under section 1293(b) than under section 1291 is the traditional rule, under the old Bankruptcy Act provision (former 11 U.S.C. §47(a)), that interlocutory appeals to courts of appeals in summary proceedings in bankruptcy were in general available as of right in "proceedings in bankruptcy," although not in "controversies arising in proceedings in bankruptcy." While section 1293(b) abolished the arcane distinction between "proceedings in bankruptcy" and "controversies arising in proceedings in bankruptcy," and substituted a finality requirement, it did not specify how finality should be interpreted. Since appellate courts have had long experience with relatively liberal appeal rules in many bankruptcy matters, and since these rules have not proved unduly burdensome, we need be somewhat less concerned about the dangers of interpreting finality in appeals under section 1293(b) slightly more broadly than in appeals under section 1291.

These policy considerations alone might be insufficient to persuade us to modify our usual finality rules. In combination with the language of *Bildisco* and *Universal Minerals*, however, policy considerations convince

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2. In the present case, the adversary proceedings in the bankruptcy court apparently continued unaffected by the appeal brought in this court.

us that the district court order appealed from below should be considered final. But it is important to stress the limited nature of our holding on jurisdiction. We hold only that when the bankruptcy court issues what is indisputably a final order, and the district court issues an order affirming or reversing, the district court's order is also a final order for purposes of section 1293(b).

III.

A.

Having established that there is jurisdiction, we next consider the merits of the dispute. The language of the statute would seem clearly to favor the position espoused by the Committee:

> A party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.

11 U.S.C. §1109(b). The words "this chapter" in section 1109(b) denote Chapter 11 of the Bankruptcy Code, the Chapter which deals specifically with reorganizations. It is important to bear this in mind since some of the confusion in this proceeding has arisen from a failure to recognize that Congress intended a creditors' committee to have more extensive rights in a reorganization than in a liquidation.

Appellants do not deny that section 1109(b) provides an absolute right of intervention to a creditors' committee in a Chapter 11 "case." Their position is based instead on a narrow interpretation of the term "case." Under their reading a "case" would not encompass the "adversary proceedings" connected with it. Neither the term "case" nor the term "adversary proceeding" is defined by the Bankruptcy Code; indeed, the

Code makes no explicit mention of "adversary proceedings."[3] The term "adversary proceeding" is, however, defined by Bankruptcy Rules 701:

> The Rules of this Part VII govern any proceeding instituted by a party before a bankruptcy judge to (1) recover money or property, other than a proceeding under Rule 220 or Rule 604, (2) determine the validity, priority, or extent of a lien or other interest in property, (3) sell property free of a lien or other interest for which the holder can be compelled to take a money satisfaction, (4) object to or revoke a discharge, (5) obtain an injunction, (6) obtain relief from a stay as provided in Rule 401 or 601, or (7) determine the dischargeability of a debt. Such a proceeding shall be known as an adversary proceeding.[4]

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3. The term "proceeding" is used in 28 U.S.C. §1471. But this was not meant to be synonymous with "adversary proceeding":

> As used in [section 1471] everything that occurs in a bankruptcy case is a proceeding. Thus, proceeding here is used in its broadest sense, and would encompass what are now called contested matters, adversary proceedings, and plenary actions under current bankruptcy law. It also includes and [sic] disputes related to administrative matters in a bankruptcy case.

1 Collier on Bankruptcy ¶3.01 at 3-33, 3-34 (15th ed. 1982) quoting S. REP. NO. 989, 95th Cong., 1st Sess. 153-54 (1978). Note the Senate Report's assumption that "adversary proceedings" are among the things that "[occur] in a bankruptcy case."

4. Under Section 405(d) of the Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549, 2685 (1978), Bankruptcy Rules in effect on September 30, 1979 — as Rule 701 was — remain in effect under the Bankruptcy Reform Act to the extent not inconsistent with the Act, until repealed or superseded by new rules prescribed and effective under 28 U.S.C. §2075. Suggested Interim Bankruptcy Rule 7001, which has been adopted by the New Jersey Bankruptcy Court, provides that a "proceeding before a bankruptcy judge for legal, equitable, or declaratory relief which arises under nonbankruptcy law is an adversary proceeding governed by Part VII

Most litigated matters in a bankruptcy case are adversary proceedings, *see* Trost, *Trial Practice Under the New Bankruptcy Rules*, 47 Am. Bankr. L.J. 111, 112 (1973); consequently the appellants' proposed reading of section 1109(b) would drastically restrict the rights of parties to appear and be heard.

The precise scope of the term "adversary proceeding" is of little significance here, since it is conceded that the two actions in which the Committee seeks to intervene are adversary proceedings. The crucial issue is whether we should read "case" to exclude adversary proceedings. Appellants would have us believe that "case" refers "to the general administration of a Chapter 11 proceeding leading up to the confirmation of a plan of reorganization by the Bankruptcy court." Appellants Brief at 15. We find no reason to adopt this crabbed definition. Appellants point to the fact that under 11 U.S.C. §301, a voluntary case is commenced by the filing of a petition, whereas under Bankruptcy Rule 703, an adversary proceeding is commenced by the filing of a complaint. This simply proves, however, that an adversary proceeding is commenced in a different manner from the case with which it is connected; no one has ever questioned this. The courts and commentators appear to be universally opposed to appellants' construction of "case." As 2 Collier on Bankruptcy ¶301.03 (15th ed. 1982) explains, "case" is "the widest term functionally" and other terms "designate steps within the case." Collier's definition was adopted in *In re Sapolin Paints, Inc.*, 6 Bankr. 582, 583 (Bankr. E.D.N.Y. 1980). *See also* the Advisory Committee's Note to Rule 101, according to which a "proceeding" is generally a litigated matter in a "case."

NOTE — *(Continued)*
of the Bankruptcy Rules." Local Rules (adopted under 28 U.S.C. §2071) are effective to the extent they are consistent with the Bankruptcy Code and with those Bankruptcy Rules that are themselves consistent with the Code. *See* 5 Collier on Bankruptcy ¶1100.01[3] (15th ed. 1982).

Attention is also called to the exact language of section 1109(b), which grants a right to appear and be heard not in "a case" but "on any issue in a case." It is unlikely that Congress would have used such sweeping language if it had not meant "case" to be a broadly inclusive term. Congress' failure specifically to mention adversary proceedings in section 1109(b) is hardly surprising, given that Congress did not specifically mention adversary proceedings anywhere in the Bankruptcy Code. Indeed, for all Congress knew, the Bankruptcy Rules that ultimately would be adopted under the Bankruptcy Reform Act of 1978 might render the expression "adversary proceedings" obsolete by utilizing some new designation or designations for litigated matters in bankruptcy.

B.

Any doubt about the meaning of the language of section 1109(b) would appear to be dispelled by the legislative history, which states that section 1109(b)[5]

> [p]rovides, *in unqualified terms*, that any creditor, equity security holder, or an indenture trustee shall have the right to be heard as a party in interest under this chapter in person, by an attorney, or by a committee. It is derived from section 206 of chapter X (11 U.S.C. 606).

S. REP. NO. 95-989, 95th Cong., 2nd Sess. 116 (1978), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5902 (emphasis added). Section 1109(b) was of course passed as a very small part of the major overhaul of the bankruptcy laws embodied in the Bankruptcy Reform Act of 1978.

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5. The Senate Report actually referred to this section as 1109(a), since prior to final amendment 1109(a) and 1109(b) were the reverse of their final version. Legislative History of §1109. 1981 Collier Pamphlet Edition, Bankruptcy Code, Part 3 at 400.

It would be a strained construction to read this "unqualified" right as being limited to participation in the general administrative aspects of cases. More importantly, the derivation of section 1109(b) from section 206 of Chapter X suggests that Congress had no intention of upsetting the long line of section 206 cases granting a broad, absolute right to appear and be heard. Section 206 had provided that "[t]he debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a proceeding under this chapter." Chapter X Bankruptcy Rule 10-210(a), which according to the Advisory Committee Note to the Rule was derived from section 206, provided that:

> (1) The debtor, the indenture trustees, and any creditor or stockholder of the debtor shall have the right to be heard on all matters arising in a Chapter X case.
>
> (2) A labor union or employees' association, representative of employees of the debtor, shall have the right to be heard on the economic soundness of a plan affecting the interests of the employees.

13A Collier Bankruptcy ¶10-210.02 (14th ed. 1977), remarks, on the relation between Rule 10-210(a)(1) and section 206, that "[t]he slightly altered language does not affect [sic] any change in the statute." Congress' obvious borrowing in section 1109(b) from the language of Rule 10-210(a) is further evidence that Congress intended for there to be no sharp break between section 206 and section 1109(b).

The statutory provision which section 206 replaced had given creditors and stockholders an absolute right to be heard on only a limited number of issues, and it was to remedy perceived deficiencies in this system of limited rights that section 206 was enacted. This Court explained the legislative history of section 206 in *In re Key-*

stone Realty Holding Co., 117 F.2d 1003, 1005 (3d Cir. 1941):

> In substituting Chapter X for Section 77B Congress clearly intended to broaden the rights of creditors to participate in corporate reorganization proceedings. Whereas subsection c of Section 77B had . . . restricted their participation as of right to but two phases of the proceeding, section 206 of Chapter X, 11 U.S.C.A. §606, conferred upon them "the right to be heard on all matters arising in a proceeding under this chapter." The intent thus disclosed by the statutory provisions is confirmed by the legislative history of the Chandler Act, which substituted Chapter X for Section 77B. In its report upon Representative Chandler's bill which became the Act of June 22, 1938, c. 575, 52 Stat. 840, the Senate Committee on the Judiciary said "Section 206 gives any creditor or stockholder, any indenture trustee, and the debtor, the right to be heard on all matters in the proceedings. Former restrictions on such right to be heard are eliminated as being undesirable." Senate Report No. 1916, 75th Cong. 3d Sess.

See also In re Philadelphia & Reading Coal & Iron Co., 105 F.2d 358, 360 (3d Cir. 1939). 5 Collier on Bankruptcy ¶1109.02 at 1109-19, 1109-20 (15th ed. 1982) summarizes the law under section 206 on the issue of concern to us:

> The standing conferred by Section 206 of the Bankruptcy Act and Chapter X Rule 10-210(a)(1) was absolute and unlimited, and gave the debtor, creditors, stockholders and indenture trustees the same rights as if they were successful intervenors in the case, but without the necessity of a formal order of intervention. Those within the specified categories who sought to participate in the reorganization,

> therefore, were by statute parties to the case. Accordingly, it was clear that there was no need to seek intervention in order to be entitled to full participation in the reorganization of any creditor, stockholder or indenture trustee, or of a duly authorized creditors' or stockholders' committee or other representative since Chapter X Rule 10-210-(a)(1) gave every substantial right or privilege that intervention could give.
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> (footnotes omitted)

For a recent example in the apparently unbroken line of cases that support the broad and absolute reading of section 206, see *Matter of Duplan Corp.*, 450 F. Supp. 790 (S.D.N.Y. 1978). In *Duplan* an indenture trustee sought to participate in an adversary proceeding instituted by creditors. The Court granted the indenture trustee a right to participate without even filing a motion to intervene, and read section 206 as intended "to remove procedural barriers to full participation" by interested parties. *Id.* at 791.

It should also be observed that there *was* a permissive intervention provision under Chapter X. It was not section 206, however, but section 207. It provided that "[t]he judge may for cause shown permit a party in interest to intervene generally or with respect to any specified matter." *See also* Chapter X Bankruptcy Rule 10-210(b). When Congress chose to derive section 1109(b) from section 206 rather than from section 207, it understood that it was adopting the mandatory and not the permissive provision. Indeed, the lack of a counterpart to section 207 in the current Code leads to an anomaly in the appellants' position. Although they assume that the bankruptcy court had discretion to permit or deny intervention by the Committee, they point to no statutory provision other than section 1109(b). But under their analysis, section 1109(b) is mandatory as to "cases" (narrowly understood) and is completely inapplicable to adversary

proceedings. Thus, under appellants' analysis, it is unclear how the bankruptcy court could have allowed intervention even if it had wanted to do so.[6]

There is no basis for concluding that by changing the statutory language from "all matters arising in a proceeding under this chapter" to "any issue in a case under this chapter" Congress meant to effect a sweeping restriction in the right of interested parties to participate in litigated matters connected with bankruptcy reorganizations. This is confirmed by the fact that the section 1109(b) phrase "any issue in a case under this chapter" is taken virtually verbatim from a Bankruptcy Rule under section 206, Rule 10-210(a), quoted *supra*. The legislative history, which explicitly derives section 1109(b) from section 206 and which calls the right to be heard as a party "unqualified," strongly reinforces the impression that Congress did not mean for section 1109(b) to introduce the radical narrowing of rights that appellants would have us find.

The fact that rights under section 206 were mandatory and wide-ranging is significant not only because section 1109(b) is derived from section 206, but also because it suggests that the appellants' policy arguments are unrealistic. Appellants claim that the confusion, disorder, and expense that supposedly would be entailed by allowing each creditor or stockholder to intervene in adversary proceedings are such that it is "clearly unthinkable" that Congress could have intended to allow such a result. But the unqualified right of creditors and stockholders to intervene appears to have been the rule under section 206 for approximately 40 years, and the legislative history of section 1109(b) shows no dissatisfaction with it.

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6. *In re Citizens Loan & Thrift Co.*, 7 Bankr. 88 (Bankr. N.D. Iowa, 1980) argued that Rule 10-210(b), allowing permissive intervention to "any interested person" in proceedings under former Chapter X, is applicable to proceedings under current Chapter 11. Perhaps appellants meant to make a similar point here.

Appellants are unable to provide any support for their speculation that multitudes of individual creditors and stockholders would intervene in adversary proceedings unless we reject the broad and absolute reading of section 1109(b). Surely relatively few individuals would have enough interest in the outcome of an adversary proceeding to seek to intervene. The applicable Bankruptcy Rules and Federal Rules of Civil Procedure would afford to the bankruptcy courts sufficient means to control any confusion, disorder or expense that might result from the intervention of those parties who do seek to intervene. And even if the means are insufficient, that insufficiency is certainly not so patent that we would be forced — in the face of considerable evidence to the contrary — to conclude that Congress could not possibly have intended the reading of section 1109(b) urged here by the Committee. Moreover, in a case such as the present one, where intervention is sought by an official creditors' committee that hopes to speed up the proceedings and prevent dissipation of the estate, there is little danger that intervention will unnecessarily deplete the estate, delay the conclusion of the case, or prejudice any party.

C.

The cases decided thus far under section 1109(b) support our view that this provision should be given as broad and absolute a reading as section 206 had received. *In re Penn-Dixie Industries, Inc.*, 9 Bankr. 936 (D. S.D.N.Y. 1981), concluded that section 1109(b) gave the bankruptcy court no discretion to bar a debtor from raising an objection to the composition of the committee of equity security holders. The court considered it "clear that Congress intended section 1109(b) to carry forward an absolute right to be heard on any issue arising in a chapter 11 reorganization." *Id.* at 939. *Penn-Dixie* quoted certain remarks of Senator DeCon-

cini and Congressman Edwards to the effect that "[r]ules of bankruptcy procedure or court decisions will determine who is a party in interest for the particular purposes of the provision in question." But *Penn-Dixie* held that the "express language of section 1109(b)" could not be overridden by such remarks. *Id.* at 939. We think it plain that in the context of section 1109(b), the remarks merely mean that the exact contours of the general phrase "party in interest" will be clarified by rules and court decisions, not that the courts will have discretion to deny intervention to the parties in interest — such as creditors' committees — that are specifically listed in section 1109(b). (The word "including" in section 1109(b) is not a term of limitation. 11 U.S.C. §102(3).)[7]

According to *In re D.H. Overmyer Telecasting Co., Inc.*, 18 Bankr. 107 (Bankr. N.D. Ohio, 1982), under section 1109(b) and Bankruptcy Rule 704, intervention in an adversary proceeding was First Bank of Boston's "unconditional right as the sole shareholder of [the debtor in possession]." *In re Citizens Loan & Thrift Co.*, 7 Bankr. 88, 90 (Bankr. N.D. Iowa, 1980), ruled that the state of Iowa is a "party in interest" entitled under section 1109(b) to intervene generally in a particular Chapter 11 case, and quoted what it called the "official" comment to section 1109(b) that this section "continues the broad concept of the absolute right to be heard in order to ensure fair representation in the case." *Sapolin Paints, supra*, interpreted section 1109(b) as conferring

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7. *See e.g. In re Casco Bay Lines, Inc.*, 14 Bankr. 18 (Bankr. App. D. Me. 1981), affirming (although not on the merits) a bankruptcy court ruling that the City of Portland was not a "party in interest" and that its right to intervene could be limited. *In re Co Petro Marketing Group, Inc.*, 680 F.2d 566, 572-73 (9th Cir., 1982), held that the Commodity Futures Trading Commission was a "party in interest" under section 1109(b) and was therefore entitled to intervene in bankruptcy proceedings and to appeal to the bankruptcy appellate panel.

an unconditional right to intervene in an adversary proceeding commenced to void a lien.[8]

Sapolin Paints was decided on the basis of Fed. R. Civ. P. 24(a)(1), which states that anyone shall be permitted to intervene when a statute confers an unconditional right. The statute in question was section 1109(b). Bankruptcy Rule 724 makes Fed. R. Civ. P. 24 applicable to adversary proceedings in bankruptcy cases, with one exception concerning service and filing of motions to intervene. 5 Collier on Bankruptcy ¶1109.02 at 1109-20 (15th ed. 1982), quoted *supra*, states that formal intervention by parties in interest is unnecessary since section 206 (and presumably section 1109(b)) automatically provides them essentially the same rights as intervenors. Collier also notes, however, that section 206 did "not of itself grant a right to notice of all steps taken in the reorganization. Section 1109 should be similarly construed." *Id.* at 1109-23, 24, footnotes omitted. *See also* 3B Moore's Federal Practice ¶24.11[1-2] at 24-454 (2d ed. 1982): "Rule 24 is inapplicable in cases where [§206] applies," footnote omitted. We need not decide, however, whether it was necessary for the Committee to move formally under Fed. R. Civ. P. 24 to inter-

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8. *Sapolin Paints'* unconditional interpretation of section 1109(b) may technically be dicta, since the court stated that it was

> unnecessary, for purposes of the present proceeding, to determine whether Chemical is entitled to intervene as of right, or only as of grace, because even if the Court were not satisfied that §1109(b) confers an unconditional right to intervene, it would permit such intervention as a matter or discretion under FRCP 24(b).

Id. at 584. *Citizens Loan, supra*, however, ruled that section 1109(b) was absolute even though it stated in dictum that it would allow intervention even if section 1109(b) were inapplicable and the intervenor were forced to rely only on the permissive intervention provision of Rule 10-210(b). *See also In re Commercial Finance Corp. of Nevada*, 16 Bankr. 98, 100 (Bankr. D.D.C., 1981) (citing *Citizens Loan*).

vene. The Committee did move formally, and there is no contention that by so doing it lost rights that it otherwise would have had.[9]

The language of the statute seems clearly to require that more than mere participation as an *amicus* be allowed. Section 1109(b) says that a party in interest may "raise . . . any issue in a case under this chapter." But an *amicus*'s participation is limited to the submission of briefs on issues already raised and considered. *See e.g., Knetsch v. United States*, 364 U.S. 361, 370 (1960); and *Re: Marin Motor Oil, Inc.*, Unpublished Opinion, DeVito, J., Appendix at 5. Legislative history confirms this reading of the statute, since it states that section 1109(b) gives "the right to be heard as a party in interest." S. REP. NO. 95-989, 95th Cong., 2nd Sess. 116, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5902, emphasis added.

Appellants cite *In re Cloud Nine, Ltd.*, 3 Bankr. 199 (Bankr. D.N.M. 1980), in support of their position that adversary proceedings are excluded from the absolute rights granted by section 1109(b). Yet in *Cloud Nine* the bankruptcy court, construing section 1109(b), declared that it "would interpret the right granted to the named parties to be heard 'on any issue in a case,' without limitation on the types of issues, to include an adversary proceeding to lift the automatic stay on virtually all assets of the Debtor." *Id.* at 200. On the other hand, the court stated that, at least under the old act, intervention should be allowed "liberally" but should not be "indiscriminate." *Id.* at 201. For this proposition, the court cited *In re Watkins Investments*, 5 Collier Bankr. Cas.

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9. The Committee has not claimed a right to intervene under Fed. R. Civ. P. 24(a)(2), which grants intervention of right under certain circumstances. *But see In re Devault Manufacturing Co.*, 4 Bankr. 382, 387 (Bankr. E.D.Pa. 1980) which granted a creditors' committee intervention under Fed. R. Civ. P. 24(a)(2), and made no reference at all to section 206 or to section 1109(b).

253, 256 (Bankr. W.D. Tenn. 1975). We believe that the citation to *Watkins* was inappropriate. *Watkins* involved a liquidation under Chapters I-VII of the Bankruptcy Act, not a reorganization. Hence, section 206 simply had no applicability in *Watkins*. Moreover, the court noted that *Watkins* was decided under the superseded Bankruptcy Act and that the issue of intervention under section 1109(b) was one of first impression. *Id.* at 200. Even if *Cloud Nine* mistakenly read *Watkins* as a section 206 case — indeed, a correct section 206 case — *Cloud Nine* should not be read as an unqualified endorsement of *Watkins* as an interpretation of section 1109(b). The court in *Cloud Nine* was evidently misled by an inapplicable decision into employing some language which suggested that in some adversary proceedings in reorganization cases parties in interest might lack an absolute right to intervene. But the holding of *Cloud Nine* offers no support to appellants.[10]

It is completely understandable that Congress would have given a creditors' committee greater rights to participate in reorganizations than in liquidations. As one commentator explains:

> In contrast to the advisory role of a creditors' committee in chapter 7 cases, the very nature of a chapter 11 case (the attempt to continue the debtor's

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10. The Committee here claims that *Watkins* involved a claim of intervention under Fed. R. Civ. P. 24(b) (that is, permissive intervention) rather than 24(a) (intervention of right). Though *Watkins* is not completely clear, it seems more likely that it was relying on Fed. R. Civ. P. 24(a)(2), which concerns intervention of right when there is no statute conferring an unconditional right to intervene. *Watkins* relies on a tax case, *United States v. Union National Bank*, 371 F. Supp. 763 (D.C. Pa. 1974), which in turn cites another tax case, *Donaldson v. United States*, 400 U.S. 517, 529 (1971), which interprets Fed. R. Civ. P. 24(a)(2). But the important point is that whether *Watkins* is based on Fed. R. Civ. P. 24(b) or on Fed. R. Civ. P. 24(a)(2), it is *not* based on the predecessor of section 1109(b) of the Bankruptcy Code.

> business, generally the continuation of a debtor in possession, and the need to address both the determination of assets available for secured and unsecured creditors and equity security holders and the determination of the allocation of said assets among creditors and equity security holders) dictates a much more active role for committees in chapter 11 cases.

DeNatale, *The Creditors' Committee Under the Bankruptcy Code — A Primer,"* 55 Am. Bankr. L.J., 43, 51 (1981). See also Congress' remarks on the role that creditors and equity security holders committees are expected to play under 11 U.S.C. §1102:

> This section provides for the appointment of creditors' and equity security holders' committees, which will be the primary negotiating bodies for the formulation of the plan of reorganization. They will represent the various classes of creditors and equity security holders from which they are selected. They will also provide supervision of the debtor in possession and of the trustee, and will protect their constituents' interests.

H.R. REP. No. 95-595, 95th cong., 2d Sess. 401, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6357. The failure of section 1102 specifically to mention the right of the committees to appear and be heard is of no help to the appellants in view of the fact that section 1109(b) specifically deals with this subject. Section 1109(b) of course gives the right to appear and be heard to parties other than creditors' committees, continuing from Section 206 and Rule 10-210(a)(1) "the broad concept of the absolute right to be heard in order to insure fair representation in the case and prevent excessive control by insider groups." Comment to §1109, 1981 Collier Pamphlet Edition, Bankruptcy Code, Part 3 at 400.

Appendix A

At oral argument appellants called our attention to *In re Segarra*, 14 Bankr. 870 (Bankr. D.P.R. 1981). In addition to a detailed defense of the constitutionality of bankruptcy court jurisdiction under the Bankruptcy Reform Act of 1978 (which is no longer valid after *Marathon Oil, supra*), and a holding that the Bankruptcy Code applies to Puerto Rico, *Segarra* addressed the question whether creditors or a creditors' committee have authority to bring certain adversary proceedings. The bankruptcy court wrote:

> Sec. 1109(b) provides that various entities including a creditor and a creditors' committee may appear and be heard on any issue in [sic] case. This section permits their intervention during the development of a Chapter 11 case when plans are being negotiated, the business conduct of a debtor being investigated, and the need for a trustee considered; this is the meat and potatoes of a Chapter 11. However, Congress has added to this standard bill of fare what we call adversary proceedings and has provided by creating our pervasive jurisdiction that they, too, may be heard by the Bankruptcy Court. But we do not read in the act or anywhere else that Congress intended in expanding our jurisdiction to create new causes of action in favor of creditors and committees. To the contrary, the Congressional history indicates that Congress was solely interested in providing an additional forum where existing causes might be heard. Thus Congress hoped to reduce the delays resulting from the prior division of the juridical business of bankruptcy courts. Sec. 1109(b) applies to cases and not to proceedings.

id. at 878, footnote omitted. The *Segarra* court seems to have conflated two distinct questions: first, whether section 1109(b) creates "new causes of action in favor of creditors and committees"; second, whether 1109(b) gives creditors and committees an absolute right to in-

tervene in adversary proceedings already initiated by a trustee or debtor in possession. Only the former issue was present in *Segarra*. To the extent that the court may have intended to express a negative answer to the second question — and we are uncertain if this is what was intended — its statements are dicta.[11]

The strongest support for the appellants appears in 5 Collier Bankruptcy Practice Guide ¶83.08[6] (1st ed. 1981), which states in part:

> A creditors' committee is not necessarily a party to an adversary proceeding unless named as such, or unless it is permitted to intervene under Bankruptcy Rule 724 . . . [1109(b)] does not necessarily mean that a creditors' committee may appear and be heard on any issue in every adversary proceeding pending in a case under Chapter 11.

The Practice Guide cites no authority for this statement, and in view of the language of the statute, the legislative history, and the case law, we are puzzled by it. We doubt if the Practice Guide can be considered as reliable a source as the well-established Collier on Bankruptcy, which takes an absolutist view of Section 1109(b).[12]

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11. On the standing of a creditors' committee to bring suit, *see Matter of Joyanna Holitogs, Inc.*, 21 Bankr. 323, 326 (Bankr. S.D.N.Y. 1982) ("[T]he right to be heard given the creditors' committee . . . includes the right to sue when a trustee or debtor in possession will not"). *See also Matter of Monsour Medical Center*, 5 Bankr. 715 (Bankr. W.D. Pa. 1980) (basing the standing of a creditor's committee to bring an adversary proceeding on grounds other than section 1109(b)).

12. According to 5 *Collier On Bankruptcy* ¶1109.02 at 1109-23 (15th ed. 1982),

> Section 1109(b) merely states that certain designated parties are "parties in interest" and thus presumably do not have to formally intervene in a chapter 11 case. Although section 1109 grants party in interest status to creditors, equity security holders and certain of their representatives, section 1109 does not purport to deprive the bankruptcy court of its discretion with

It is appropriate to add a point stressed by the district judge and by the Committee in its brief, namely that the broad and absolute construction of section 1109(b) comports with the usual expectation of parties in interest that they will have a right to be heard, as parties in interest, by the tribunal adjudicating their interests. This expectation has its roots in notions of due process and fair play, even though there is no allegation here that denial of a right of intervention to the Committee would itself violate due process. We are especially reluctant to adopt the extremely strained interpretation of section 1109(b) proposed by appellants when to do so would frustrate this expectation of participation.[13]

IV.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

NOTE — *(Continued)*

respect to allowance of a petition for intervention in a reorganization case by other parties.

Footnotes omitted. We have already seen that Collier on Bankruptcy would include adversary proceedings within the definition of "case." *Supra* at 12. Thus, the passage quoted here implies that the bankruptcy court has no discretion to deny intervention to creditors in an adversary proceeding connected with a Chapter 11 case.

13. Because we have held that section 1109(b) affords an absolute right, we need not consider the Committee's contention that even if section 1109(b) is permissive the bankruptcy court abused its discretion in denying intervention.

APPENDIX B

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 81-3083 and 81-3084

IN THE MATTER OF:

MARIN MOTOR OIL, INC.,

Debtor.

(Bankruptcy No. 81-02263)

OFFICIAL UNSECURED CREDITORS COMMITTEE,

VS.

MICHAELS, DAVID P., TRUSTEE of Marin Motor Oil, Inc. and HONORABLE HUGH LEONARD, U.S. TRUSTEE,

(D.C. Civil No. 81-03273)

(Adversary Nos. 81-616 and 81-639)

Nicholas Marin, Nick-O-Mar Realty Corp., Petrobras Company, Inc., Marin Retail Gasoline Sales Company, Marin Oil Co., Inc., Fra Mar, Inc., Marin Mercantile Oil Exchange, Marin Drilling Corp., Marin Holding Company,

Appellants in No. 81-3083.

Appendix B

David P. Michaels, Trustee,

Appellant in No. 81-3084.

(D.C. Civil No. 81-03273)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY—NEWARK

Present: Adams and Higgingbotham, Circuit Judges; Teitelbaum, District Judge.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey—Newark and was argued by counsel July 20, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered November 23, 1981, be, and the same is hereby affirmed. Costs taxed against appellants.

Attest:

Sally Mrvos
Clerk

September 29, 1982

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* Honorable Hubert I. Teitelbaum, United States District Court for the Western District of Pennsylvania, sitting by designation.

APPENDIX C

Oral Opinion of the Honorable Herbert J. Stern, U.S.D.J.
(November 9, 1981)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

Civil No. 81-3273

IN THE MATTER OF:

MARIN MOTOR OIL, INC. B. 81-2263; Adv. Proceedings 81-616 and 81-639 OFFICIAL UNSECURED CREDITORS COMMITTEE,

vs.

DAVID P. MICHAELS, *et al.*

Newark, New Jersey
November 9, 1981

Before:

The Honorable Herbert J. Stern, U.S.D.J.

Appearances:

Nolan, Bell & Moore, Esqs.,
By: William F. McEnroe, Esq.,
Attorneys for the Creditors Committee.

Appendix C

Ravin, Katchen & Greenberg, Esqs.,
By: Jack M. Zackin, Esq.,
Attorneys for David P. Michaels, Trustee.

Kleinberg, Moroney, Masterson & Schachter, Esqs.,
By: Walter J. Greenhalgh, Esq.,
Attorneys for Some Defendants.

Ravin & Kesselhaut, Esqs.,
By: Peter R. Sarasohn, Esq.,
Attorneys for Mr. Marin.

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(2)* The Court: Well, the issue here is the provision of 11 United States Code, Section 1109(b). Those provisions seem to me to be pretty clear. There is no dispute about the fact that the appellant, here, is, in fact, a party in interest or a group of parties in interest. And the section of law to which I have just referred specifically says that they may appear and be heard on any issue under this chapter.

I can see no reason to read those words other than what they appear, nor do I find that the permission given to them to appear as amicus curiae either solves the problem which the Bankruptcy Judge saw in refusing to add them as parties nor adequately protects them, their rights and interests under the provisions of law which I have read. Because if what the Bankruptcy Judge was aiming to do was simply to limit the number of parties and the number of people that may be heard, he has

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* Figures in parentheses refer to each new page of the stenographic transcript.

certainly not effectuated that by granting them amicus curiae status; this, giving them the—in effect, the right to be heard.

On the other hand, if, in fact, as a party in interest they have amicus curiae status, it may well not be sufficient. I see in this effort to temporize and accommodate, while laudible, undoubtedly, in its intent, achieving neither purpose; either the ability (3) to control and limit the number of people before the Court nor the protection of people whose interests may be jeopardized by what that Court does.

Now, I recognize the fact there are Bankruptcy Court decisions which go both ways on this subject, and the issue is certainly not free from doubt. Yet, so far as I'm concerned, it seems to me if there is any doubt about it all it ought to be decided in such a way as to accommodate the right of people whose interests may be jeopardized by a proceeding appearing before the tribunal which is going to decide it. That seems to be the purpose of 11 U.S.C. 1109(b), and that purpose is not really accomplished by amicus curiae status.

We deal here not with a question of fact to which I would, of course, give great deference in respect to any judicial determination by Judge DeVito. This is a sheer question of law construing what is required by a statute which appears on its face to give any party at interest the right to appear and be heard before the Court.

More, you know that kind of comports with what most people expect Courts to do; namely, if someone's interests or rights are to be adjudicated by what a tribunal does, it is usual in the ordinary course of (4) events that people expect that that party should have the right to be heard. Not as a matter of grace, extended through an amicus curiae friend of the Court. Not as a friend of the Court,

but as a party in interest fighting for what those interests are. Heard not as a favor, but because they are a party in interest.

Now, this may be wrong. If it is, in your judgment, I urge you to go further with this appellate process, but it's the best I can do for you.

Accordingly, in all respect to the Bankruptcy Judge with the recognition he may be right and I may be wrong, nonetheless, his decision is reversed, with direction to permit the Unsecured Creditors Committee—

Mr. Sarasohn: Judge, before you rule, can we be heard on what your Honor stated before you rule?

The Court: Go ahead. I ruled. It doesn't matter. I can change my mind if you persuade me.

Mr. Sarasohn. Thank you. First, I understand your Honor's thought process at this point. Looking at 1109(b) to give creditors or a Creditors Committee the absolute right to intervene in any case or any real controversy in an adversarial position.

The Court: Absent extraordinary circumstances, I can't see why they shouldn't have it.

(5) Mr. Sarasohn: Your Honor, I don't think it can be both, respectfully. Because if there are extraordinary circumstances, then it isn't an absolute right. So what we are dealing with, I believe, is an absolute right or no right under that section of 1109(b). Let me deal with that.

The Court: You may be right.

Mr. Sarasohn: I think Courts sometimes make that mistake. First, In re: Cloud Nine case, in which everyone cited for their own propositions. The Creditors Committee will say they have the absolute right, however, that Judge said, "Absolute right," but you can do—only do it in these limited situations.

I think that the issue then is is it an absolute right or is it not an absolute right?

Now, Collier, who is recognized to be one of the experts in the field, has indicated in its most recent service that it is not an absolute right. It says, "If a Trustee has been appointed, the ability of a Creditors Committee to appear and be heard in an adversarial proceeding may well be eliminated or limited by the Bankruptcy Court unless it can be shown by the Creditors Committee that the Trustee is not performing his duties."

Now, your Honor, it goes on, and there are (6) additional words that support that meaning, which I think is clear, is that there is no absolute right in an adversarial proceeding for a Creditors Committee to intervene. Your Honor is concerned—

The Court: What authority is there for that statement besides Collier's own—is Collier citing Collier?

Mr. Sarasohn: He refers to the fact and the Bankruptcy Rule 724 that a Creditors Committee is not necessarily a party to any adversarial proceeding named as such or unless it is permitted to intervene. He also indicates that in Section 1103 neither the powers of the Creditors Committee enumerated in that section or the Bankruptcy Rules express the entire Creditors Committee to be heard of right in an adversarial proceeding. 1103, your Honor, outlines the duties of a Creditors Committee. It does not in any way suggest they can bring suit—let me explain one other thing, your Honor.

Your Honor is concerned, and I think rightfully, about an interested party protecting its rights. I think in this kind of a context with a Creditors Committee, which is not like the two creditors in this case, who are defendants who do have an actual financial interest in the litigation as directly as (7) creditors, represents, generally, the creditors as a whole.

Appendix C

If there is a problem with the Trustee not performing his duties, then in that kind of a situation the Creditors Committee does have rights to protect itself. It can intervene in that kind of a situation and can be granted permission to intervene based upon the fact the Trustee isn't doing its job. It also—

The Court: Maybe one of the ways to find out if the Trustee is doing his job is to be a party to the litigation. That is not to say there may not be limitations put on them as to what they may do as parties. It may well be in the discretion of the Bankruptcy Judge to say, "Well, now, you're made a party here, but your function for at least now is to do this, that or the other."

Mr. Sarasohn: When we're not under 1109(b). 1109(b), if your Honor's indication is correct, is an absolute right to intervene as a party for whatever purpose.

The Court: That is what the words say.

Mr. Sarasohn: In a case, your Honor. The word "case" —and I think all the papers submitted to your Honor supports this—a case is not necessarily an adversarial proceeding. The case in Bankruptcy Court (8) refers to the Chapter XI proceedings. It infers the rehabilitation proceeding. It gives them the opportunity to participate, generally, in all those proceedings.

The Court: What governmental interest is advanced by the reading you suggest and what governmental interest is hurt by what I suggest?

Mr. Sarasohn: I am representing a defendant. I can tell you what interest is hurt in my case.

When you have two parties in a case with two separate lawyers doing the same thing, duplications—in fact, this Creditors Committee doesn't propose to bring any new actions, but, doing the same things under the same theories, I, as one of the defendants, now have to respond to two

separate attorneys doing the same thing. That increases my cost.

Now, the Creditors Committee—

The Court: I don't know about that.

Mr. Sarasohn: The Creditors Committee can, in the ultimate, apply to the Bankruptcy Court to recover its costs, to issue its Affidavit.

The Court: The Bankruptcy Court—what I would suppose, would have the right to say, "Look, you know your intervention here, while maybe is a right, really didn't add anything. You didn't have to do this. The Trustee would do all that. I won't give you anything (9) for that.

Mr. Sarasohn: Exactly, your Honor. There is no such relief for a mere defendant who also has to undertake the costs, who also now has to respond to duplication of evidence.

The Court: I don't think so. If they say the same things, you only have to say one thing in response. I've never heard of saying the same thing twice, so you had to stammer or stutter because someone said it twice to you. I've been in litigation for twenty years.

Mr. Sarasohn: Judge, I think the rule generally is and I think the reasons underlying the rule are appropriate, that two lawyers in the same case shouldn't be representing the same interests.

In this case, separately, in this case we have a Trustee representing the estate, the creditors as a whole. You also have a Creditors Committee representing the creditors.

The Court: Perhaps the Bankruptcy Judge will say: In those circumstances I shall hear only from the Trustee, unless you disagree with him. If you do, you must show me why.

Mr. Sarasohn: He may. He may not, Judge.

The Court: You know, it isn't the Creditors ((10) Committee who appoints the Trustee, is it?

Mr. Sarasohn: No, it is not.

The Court: Who appoints him?

Mr. Sarasohn: The Court.

The Court: Yes. So that Trustee, you know—

Mr. Sarasohn: Excuse me. I'm sorry, your Honor. I am incorrect. In this district the United States Trustee is already appointed. Hugh Leonard.

The Court: Sure. But he's a Trustee. What I'm trying to say, he's a Trustee for the creditors. The creditors have nothing to do with his selection; is that correct?

Mr. Sarasohn: That's correct.

The Court: They are, in effect, hostages by law as to what he does.

Mr. Sarasohn: In this case, I think—I'm not to the case—the other counsel can address this. This was a case where there was no Trustee. A debtor in possession. Due to what the Trustee's done, there was a Trustee appointed. They withdraw their Complaint.

The Court: I feel there is a real interest to be advanced. In the real world, with the people who are the beneficiaries of their Trustee, really have nothing to say about who he is or how he will perform. If they (11) want to participate in the lawsuit, too, provided there is no greater attendance expenses for anyone other than themselves, then I don't see why it should lie in the mouth of anybody on the other side of the aisle to protest about it.

I adhere to my ruling. Submit an order.

Mr. McEnroe: Thank you, your Honor.

(Recess.)

Mr. Greenhalgh: We'd like to make an application for a stay of your Honor's order to appeal.

The Court: Sure. You may put that in the order. That is granted. Why not? Sure.

I'll give you a right to appeal. I won't take that away from you. You have no dispute about that?

Mr. McEnroe: Our only problem with that, the thrust of our argument was to move these cases.

The Court: They have the right to appeal.

Mr. McEnroe: Certainly they have the right to appeal. I don't see how they will be prejudiced pending our right to appeal if we don't participate and the case will proceed without us.

The Court: The case will not proceed. I will stay the bankruptcy proceeding.

Mr. Zackin: On behalf of the Trustees, I have a problem with that in that we are, by these (12) proceedings, looking to reach out for certain assets which are not now subject to the Court's jurisdiction.

The Court: It may be they have no right to be in the case. But we'll give them the right of appeal, certainly. I will not deprive them of such a right merely because the Bankruptcy Judge thinks they don't have a right. And I think they have the right at some point.

Mr. Greenhalgh: Your Honor, if I may, also, the assets which they seek to extend these proceedings over are there. There is a stipulation on the record now by order of the Court, and I believe there is restraining orders against the defendants from transferring these assets out. Nothing has been brought to anyone's attention.

The Court: I will not let you win by default. I have ruled they have a right to intervene. You have a right to challenge that ruling on appeal. I will let you.

Mr. Greenhalgh: Yes, sir.

The Court: But I will not let you by the mere act of taking an appeal stay my order while the underlying action continues without their participation.

Mr. Greenhalgh: Yes, sir.

The Court: That would be ludicrous.

(13) Mr. Greenhalgh: Your Honor, if I'm clear, under your Honor's ruling you will stay—

The Court: I will stay this. But if I stay their right to intervene, I must stay the entire proceedings.

Mr. Greenhalgh: Yes, sir.

The Court: You must make your choice.

Mr. Greenhalgh: Your Honor, I will submit an order, then, in accordance with your Honor's ruling. We will be seeking an appeal. And also to stay the bankruptcy proceeding pending that appeal.

The Court: All right. You have no question about that?

Mr. McEnroe: Our position is that it is urgent that the proceedings in the bankruptcy case proceed immediately and that there be no stay.

The Court: Well, if you don't want them stayed, I won't. On the other hand, I will stay my order pending an appeal.

Mr. McEnroe: Our right to intervene?

The Court: Certainly. That I will do for the obvious reason that I'm not infallible.

Mr. McEnroe: Your Honor, I just see no prejudice to them by our participating in the interim while an appeal is processed, whereas the prejudice to (14) us is obvious they are allowed to proceed without us. I just don't see how they are prejudiced during the interim.

The Court: Perhaps I should not state it. Let the Court of Appeals decide whether to stay it or not.

Mr. Greenhalgh: Your Honor, if I may, though? One of the prejudices will be what I believe Mr. Sarasohn pointed out as far as defending against an additional party in this particular action. But, also, your Honor, if I may, this action was instituted with the full knowledge of the Creditors Committee since July.

Appendix C

The Court: I will not stay my order. If the Court of Appeals wishes to say it, they may. I see now that the true path here is not to stay it. I was interested in getting it to the Court of Appeals. I see now the way to do it. If they have doubt about it they can stay it. But, in any event, the bankruptcy proceedings will go on. They will either go on as I think they should go on with the party of interest a party to it, or in the event you are able to persuade a Judge or panel of the Court of Appeals, that portion of it will be stayed.

Submit an order.

• • •

APPENDIX D

Letter Opinion of Court of Bankruptcy dated October 22, 1981

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
COURT OF BANKRUPTCY

D. JOSEPH DEVITO
Bankruptcy Judge

U. S. Post Office & Court House

Telephone 645-2630

Newark, N. J. 07102

October 22, 1981

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Counsellors:

Re: Marin Motor Oil, Inc., Debtor. No. 81-0616

David P. Michaels, Trustee v. Nicholas Marin, Ilse Marin and Marin Holding Company

David P. Michaels, Trustee v. Nicholas Marin, Ilse Marin, Nick-O-Mar Realty Corp., Petrobras Company, Inc., Marin Retail Gasoline Sales Company, Marin Oil Co., Inc., Fra-Mar, Inc., Marin Mercantile Oil Exchange, Marin Drilling Corp., and Marin Holding Company

This is in response to the formal motions to intervene filed by the official unsecured creditors committee, and the oral motions filed by other creditors of the above debtor, all in the captioned two adversary proceedings.

11 U.S.C. §1109(b) specifies that party in interest may appear and be heard on any issue in a Chapter 11 case.

Since the subsection defines "party in interest" to include a creditors committee and a creditor, there is no doubt but that petitioners are parties in interest.

The express participatory rights conferred by §1109(b) on a party in interest in a Chapter 11 reorganization would appear to be satisfied in the instant case other than by the granting of intervention. Subsection (b) does not specifically include or exclude adversary proceedings. Petitioners, however, do not represent that they seek to intervene to try new or related issues, but rather, having adopted the complaint of the trustee in each instance, seek to intervene only to represent their respective clients' interests in these proceedings.

While this Court recognizes that the rule on intervention should be liberally construed, so that parties affected by a Chapter 11 case may appear and be heard, 5 Collier on Bankrupcty 1109-22 to 1109-23 (15th ed. 1981), such liberality has its limits. *See In re Cloud Nine, Ltd.,* 3 B.R. 199, 201, 6 B.C.D. 26, 1 C.B.C. 2d 589 (B. Ct. D. N. Mex. 1980). There is no absolute right to intervene. Intervention is permissive rather than mandatory. *In re Watkins Investments,* 5 C.B.C. 253, 256 (B. Ct. W.D. Tenn. 1975).

The purposes underlying §1109(b) are to insure fair representation and prevent excessive control by insider groups. *In re Cloud Nine, Ltd.,* 3 B.R. at 201. All of the foregoing purposes are being met presently by the trustee. There appears to be no need at this time for an additional administrative expense overlay to exacerbate rather than promote orderly procedure and due process, as contemplated under §1109(b).

Under Rule 24 of the Federal Rules of Civil Procedure, there are three interests to be considered, to wit, the pro-

tection of the non-parties, trial convenience, and the protection of the original parties. It appears to this Court that on every count the purposes of the Chapter 11 proceeding will be most effectively served by denying intervention to the petitioners.

The Court will, however, allow the official creditors committee, through its counsel, to appear in its behalf and that all creditors as an *amicus curiae,* with its participation in the proceeding limited to the submission of briefs on all factual and legal issues raised and considered. *See East Brunswick Twp. Bd. of Ed.* v. *East Brunswick Twp. Council,* 48 N.J. 94, 107 (1966). *See generally Casey* v. *Male,* 63 N.J. Super. 255 (1960).

Submit an Order in accordance with the above.

Very truly yours,

D. Joseph DeVito
Bankruptcy Judge

DJD/mc